

## IOWA UTILITIES BOARD

IN RE:  EXECUTIVE ORDER 10 — REVIEW RULEMAKING RULES [199 IOWA ADMINISTRATIVE CODE CHAPTER 3]	DOCKET NO. RMU-2023-0003
---	--------------------------

### ORDER COMMENCING RULEMAKING

#### INTRODUCTION

On January 10, 2023, Gov. Kim Reynolds issued Executive Order Number 10 (Executive Order), which put a moratorium on agency rulemaking and directed agencies, including the Utilities Board (Board), to engage in a comprehensive evaluation of existing rules. As an initial step in the evaluation process and for each of the Board's administrative code chapters, section III(A) of the Executive Order directed the Board to perform a "retrospective analysis that includes a comprehensive evaluation and rigorous cost-benefit analysis of each existing administrative rule to determine: whether the benefits of the rule are being achieved, whether the benefits of the rule justify the costs, and whether there are less restrictive alternatives to achieve the benefits." For those chapters the Board seeks to renew, section III(A)(ii) directs the Board to "start the rulemaking from a zero-base and not seek to reauthorize an existing rule chapter without a critical and comprehensive review." Section III(A)(ii) of the Executive Order further directs the Board to "remove obsolete, outdated, inconsistent, incompatible, redundant, or unnecessary language, *including instances where rule language is duplicative of statutory language.*" (Emphasis added.)

DOCKET NO. RMU-2023-0003

PAGE 2

In compliance with the Executive Order, the Board conducted a retrospective analysis of chapter 3 and completed the Red Tape Review Rule Report.<sup>1</sup> Finding that the benefits of chapter 3 outweighed the costs imposed, the Board proposed to re-promulgate a version of chapter 3 that complied with the objectives of the Executive Order. As shown in the “metrics” section of the Red Tape Review Rule Report for chapter 3, the version of chapter 3 that the Board proposed to re-promulgate resulted in the repeal of 3 rules, the reduction of 1,335 words, and the elimination of 37 “restrictive terms.” Further, the Board used the Red Tape Review Rule Report as a guide in preparing a draft version of the chapter 3 Regulatory Analysis.

On August 1, 2023, the Board issued an order that, in part, opened the above-captioned docket, published the completed chapter 3 Red Tape Review Rule Report (as Attachment A to the order), published the draft chapter 3 Regulatory Analysis (as Attachment B to the order), and set a comment deadline and technical conference date. The Board also caused the draft regulatory analysis to be published in the August 23, 2023 Iowa Administrative Bulletin (IAB).

On October 4, 2023, a public hearing was held to allow interested persons the opportunity to present their views concerning the draft chapter 3 regulatory analysis and was attended by the Office of the Consumer Advocate (OCA), a division of the Iowa

---

<sup>1</sup> Pursuant to Section III(A)(i) of the Executive Order, the Administrative Rules Coordinator and the Iowa Department of Management (IDOM) were directed to develop a “standardized process for the required retrospective analysis” and create such necessary forms. To evidence an agency’s compliance with the retrospective analysis, a “Red Tape Review Rule Report” form was created. See <https://dom.iowa.gov/red-tape-review> (location of forms) (last accessed on December 11, 2023). Within the form, the agency must record the analytical steps of its retrospective analysis and record the agency’s compliance with the Executive Order objectives through the reporting of certain metrics (*i.e.*, the number of rules repealed, the number of words reduced in the chapter, and the number of “restrictive terms” eliminated).

DOCKET NO. RMU-2023-0003

PAGE 3

Department of Justice; Black Hills/Iowa Gas Utility Company, LLC d/b/a Black Hills Energy (Black Hills); MidAmerican Energy Company (MidAmerican); and Iowa-American Water (Iowa-American). The Board also received written comments from the Iowa Communications Alliance, OCA, Black Hills, MidAmerican, Iowa-American, and ITC Midwest LLC (ITC Midwest).

Pursuant to the Executive Order, an agency may not commence a formal rulemaking without first approving a final regulatory analysis and receiving preclearance through a Request to Initiate Rulemaking. In an order previously issued in the above-captioned docket, the Board approved a final regulatory analysis for chapter 3, and as part of that order, indicated it was submitting a Request to Initiate Rulemaking. Since issuance of that order, the Board received preclearance to commence this chapter 3 rulemaking.

### **PROPOSED CHANGES FROM DRAFT REGULATORY ANALYSIS**

From the proposed version of chapter 3 published in the August 23, 2023 IAB, the Board proposes the following changes and notes the following oral and written comments.

#### **A. Rule 3.3.**

In its written comment, OCA suggested the Board amend rule 3.3 by including a sample Petition for Rulemaking form that is modeled from provisions in the Uniform Rules of Agency Procedure. See <https://www.legis.iowa.gov/DOCS/Rules/Current/UniformRules.pdf> (last accessed on December 11, 2023). MidAmerican, in its filed comments, agreed with OCA's recommendation.

DOCKET NO. RMU-2023-0003

PAGE 4

During the October 4, 2023 public hearing, discussion occurred regarding the inclusion of a sample Petition for Rulemaking form on the Board's "Forms and Applications" webpage, and no participant opposed the same. Therefore, in lieu of OCA's proposed inclusion of the sample form in rule 3.3, the Board has added a sample Petition for Rulemaking form on its website. See <https://iub.iowa.gov/records-documents/iub-forms-applications> (last accessed December 11, 2023).

**B. Rule 3.6.**

Proposed rule 3.6 contains three subrules, each of which will be discussed in turn.

The first sentence of subrule 3.6(1), as published in the August 23, 2023 IAB, provides as follows:

The board may, by written order, adopt, amend, or repeal the rule pursuant to the rulemaking proceeding, or dismiss the proceeding in accordance with Iowa Code section 17A.4.

OCA contends the "may" in the above-quoted sentence should be replaced with "shall."

OCA contends that pursuant to Iowa Code § 17A.4(1)(b), "within 180 days following the published notice or within 180 days after the last oral presentation, whichever is later, the board 'shall adopt a rule pursuant to the rulemaking proceeding to shall terminate the proceeding by publishing a notice of termination in the Iowa administrative bulletin.'"

(Emphasis added.) According to OCA, in order to make the sentence consistent with the statute, the restrictive language should be retained.

However, as noted above, section III(A)(ii) of the Executive Order directs the removal of rule language that "is duplicative of statutory language." Because, as observed by OCA, the governing statute already sets forth the legal principles contained

DOCKET NO. RMU-2023-0003

PAGE 5

in the first sentence of subrule 3.6(1), the Board will not propose to re-promulgate that sentence.

The second sentence of subrule 3.6(1) provides that the Board may identify a specific effective date for the adoption, amendment, or repeal of a rule. However, because this sentence is duplicative of authority provided in Iowa Code § 17A.5(2), the Board will not re-promulgate.

Existing Board subrule 3.9(2) sets forth the circumstances in which the Board may adopt a rule that differs from the version published in the Notice of Intended Action (NOIA). Proposed subrule 3.6(2), as published in the August 23, 2023 IAB, is a shortened version of existing Board subrule 3.9(2) that summarily acknowledges that the Board may adopt a rule that differs from the version published in the Notice of Intended Action with the detailed circumstances in which this may occur being omitted. Certain stakeholders request that the detailed circumstances contained in existing subrule 3.9(2) be retained, stating that without those limitations, the Board could adopt a rule that substantially differs from the NOIA version.

However, the limitations imposed on the Board, and every other executive branch entity with rulemaking authority, in adopting a rule that has been changed from the NOIA version is not imposed by the agency's own rules; rather, the limitation is imposed by Iowa Code chapter 17A and other legal authorities. As noted within the Legislative Service Agency's "Rulemaking Guide," while the text of a rule published in the NOIA may be changed due to oral and written comments received, the question becomes "whether the noticed language has been changed to such a degree upon adoption that the public arguably did not receive sufficient notice of what the final

DOCKET NO. RMU-2023-0003

PAGE 6

language might be.” <https://www.legis.iowa.gov/docs/publications/lg/14966.pdf>, p. 29 (Jan. 2021 version) (last accessed December 11, 2023). Accordingly, an agency may make even substantial changes to a noticed rule “as long as those changes are within the scope of the original notice and a logical outgrowth of the comment received on the proposal.” *Id.* (citing *Iowa Citizen/Labor Energy Coal. v. Iowa State Commerce Comm’n*, 335 N.W.2d 178, 180-81 (Iowa 1983)).

The circumstances contained in existing subrule 3.9(2) are merely a recitation of the factors created by other authorities for use in determining whether adopted changes to a noticed rule are permissible. Because this legal limitation exists outside of current subrule 3.9(2) and proposed subrule 3.6(2) and because the relevant factors exist outside the Board’s rules, in light of the Executive Order’s direction to remove unneeded language, the Board will not propose to re-promulgate proposed subrule 3.6(2).

Finally, proposed subrule 3.6(3) provides that any interested person may request a rulemaking statement in accordance with Iowa Code § 17A.4(2). Again, because this proposed subrule is duplicative of the authority set forth in chapter 17A, the Board will not re-promulgate.

In sum, because all the provisions of proposed rule 3.6 are duplicative of existing statutory provisions or other authority that governs the Board’s rulemaking, the Board is not proposing to adopt the rule.

### **C. Rules Review.**

Pursuant to Iowa Code § 17A.7(2), executive branch agencies with rulemaking authority are required to conduct a comprehensive review of each adopted chapter every five years. To provide transparency regarding the agency’s chosen method of

DOCKET NO. RMU-2023-0003

PAGE 7

compliance with this statutory requirement, the Board adopted existing subrule 3.11(2), which provides that the Board will review one-fifth of its chapters each year on a rotating basis such that at the end of the five-year period, the Board will have performed a comprehensive review of each of its chapters.

In the version of chapter 3 published in the August 23, 2023 IAB, the Board did not include the subrule 3.11(2) language. However, because the provision provides information to the public concerning its method for performing its five-year review, the Board will reinsert a modified version of existing subrule 3.11(2) as new rule 3.6.

### **CONCLUSION**

The Board is proposing to rescind and revise chapter 3. The proposed rescission and revision is shown in the Notice of Intended Action (NOIA) attached to this order as Attachment A and incorporated in this order by reference. The official version of the NOIA will be published in the IAB and may contain additional nonsubstantive editorial changes. The NOIA will be submitted to the Administrative Rules Code Editor and published in the IAB. Additionally, per the Executive Order, the Board will hold two public hearings, the dates for which will be contained in the NOIA published in the IAB. The date for filing written comments will also be contained in the NOIA published in the IAB.

### **ORDERING CLAUSE**

#### **IT IS THEREFORE ORDERED:**

The Notice of Intended Action attached to this order will be submitted to the Administrative Rules Code Editor for review and publication in the Iowa Administrative

DOCKET NO. RMU-2023-0003

PAGE 8

Bulletin and may contain minor editorial changes that are not shown in the attached Notice of Intended Action. The Notice of Intended Action published in the Iowa Administrative Bulletin will identify the public hearing dates and the written comment deadline.

**UTILITIES BOARD**

Erik M. Helland Date: 2024.01.17  
12:05:59 -06'00'

---

Joshua Byrnes Date: 2024.01.17  
09:10:25 -06'00'

---

ATTEST:

Jackie Yearington Date: 2024.01.17  
14:42:53 -06'00'

---

Sarah Martz Date: 2024.01.17  
14:19:30 -06'00'

---

Dated at Des Moines, Iowa, this 17th day of January, 2024.



UTILITIES DIVISION [199]

DRAFT Notice of Intended Action

The following rule-making action is proposed:

ITEM 1. Rescind 199—Chapter 3 and adopt the following **new** chapter in lieu thereof:

CHAPTER 3  
RULEMAKING

**199—3.1(17A,474,476) Purpose and scope.**

**3.1(1) Scope.** These rules govern the practice and procedure in all rulemaking proceedings of the board.

**3.1(2) Rules of construction.** If any provision of a rule or the application of a rule to any person or circumstance is itself or through its enabling statute held invalid, the invalidity does not affect other provisions or applications of the rule that can be given effect without the invalid provision or application, and to this end the provisions of the rule are severable.

**199—3.2(17A,474,476) Initial stakeholder input.** In addition to seeking information by other methods, the board may solicit comments from the public on the subject matter of possible rulemaking by issuing an order through its electronic filing system or by causing notice of the subject matter to be published in the Iowa Administrative Bulletin, indicating where, when, and how persons may comment.

**199—3.3(17A,474,476) Petition for adoption of rules.**

**3.3(1) Petitions.** Any interested person may petition the board for the adoption, amendment, or repeal of a rule pursuant to Iowa Code section 17A.7.

**3.3(2) Stakeholder comments.** Other interested persons may file written comments containing data, views, or arguments concerning the petition within 20 days of the filing of the petition. Reply comments may be filed within 27 days of the filing of the petition. The board may allow additional time for filing comments and reply comments at its discretion.

**199—3.4(17A,474,476) Commencement of proceedings.** Rulemaking proceedings are commenced upon written order of the board.

**199—3.5(17A,474,476) Rulemaking oral presentation.**

**3.5(1) Requests.** If an oral presentation is not scheduled by the board, any interested person may file a request for an oral presentation.

**3.5(2) Written appearance.** Any interested person may participate in rulemaking oral presentations in person or by counsel.

**3.5(3) Oral presentations.** Participants in rulemaking oral presentations may submit exhibits and present oral statements of position, which may include data, views, comments, or arguments concerning the proposed adoption, amendment, or repeal of the rule. Oral statements are not made under oath and are not subject to cross-examination.

**ATTACHMENT A**

**3.5(4) Comments and limitations.** The board may, in its discretion, permit reply comments and request the filing of written comments subsequent to the adjournment of the oral presentation. The board may limit the time of any oral presentation and the length of any written presentation.

**199—3.6(17A,474) Review of Rules.** To facilitate the five-year review provisions of Iowa Code section 17A.7(1), the board will review a portion of its chapters each fiscal year over each five-year period under the following schedule:

*a.* In fiscal year 2018 and every fifth year thereafter, the board will review Chapters 1 through 9 of its rules.

*b.* In fiscal year 2019 and every fifth year thereafter, the board will review Chapters 10 through 18 of its rules.

*c.* In fiscal year 2020 and every fifth year thereafter, the board will review Chapters 19 through 27 of its rules.

*d.* In fiscal year 2021 and every fifth year thereafter, the board will review Chapters 28 through 36 of its rules.

*e.* In fiscal year 2022 and every fifth year thereafter, the board will review Chapters 37 through 45 of its rules.

*f.* If the board adopts additional chapters in its rules, such chapters will be reviewed every fifth fiscal year from the fiscal year in which they are made effective.

These rules are intended to implement Iowa Code sections 17A.4 through 17A.7, 474.5, and 476.2.